IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR.

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JUDGMENT

Ashok Kumar
vs.
Gopi Ram

S.B.CIVIL SECOND APPEAL NO.52/1988 UNDER SECTION 100 CPC AGAINST THE JUDGMENT AND DECREE DATED 11.5.1988 PASSED BY SHRI MAHENDRA KUMAR JAIN, ADDITIONAL DISTRICT JUDGE NO.2, SRI GANGANAGAR IN CIVIL APPEAL NO.85/1985 (38/1984).

DATE OF JUDGMENT ::: 17.5.2006

PRESENT

HON'BLE MR. PRAKASH TATIA, J.

Mr. RK Singhal, for the appellant.
Mr. Manish Shishodia, for the respondent.

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BY THE COURT:

Heard learned counsel for the parties.

The appellant is aggrieved against the eviction decree of the trial court dated 22.8.1984 which was upheld by the first appellate court vide judgment and decree dated 11.5.1988.

Brief facts of the case are that the plaintiff/respondent filed a suit for eviction against the defendant/appellant on the ground that the appellant is tenant in one of the shops of the plaintiff where the plaintiff wants to settle his two sons who are pursuing their medical courses in medical college for becoming doctor. The plaintiff also alleged that the defendant materially altered the premises, therefore, the plaintiff is entitled to decree for eviction of the tenant. Issue for committing default by the tenant was also there.

The trial court, however, decreed the suit of the plaintiff on the ground of personal bonafide necessity after considering the plea of the defendant about completion of studies by plaintiff's sons and their joining services at different places. The trial court also held that the defendant materially altered the suit premises and, therefore, on this ground alone, the plaintiff is entitled for decree of eviction.

The appellate court upheld the finding of the trial court. Hence, this second appeal.

The appeal was admitted by the order of this court dated 12.7.1988 but without framing any substantial question of law. While admitting, this Court observed that the appellant has moved three applications viz., one under Order 6 Rule 17 CPC, another under Order 41 Rule 27 CPC and the third one for permission to urge additional grounds in appeal.

Second appeal can be admitted only if substantial question of law is involved and since the appeal has been admitted without framing substantial question of law, therefore, to find out whether any substantial question of law is involved in the appeal, the appeal is heard.

According to learned counsel for the appellant, the plaintiff filed the suit for eviction of appellant on the ground of personal bonafide necessity and with allegation of material alteration. According to learned counsel for the appellant, even if all the allegations levelled by the plaintiff against the appellant of making changes in the suit premises are accepted to be true, even then, that does not constitute material alteration in the suit premises. The only allegation against the defendant is that he has constructed one Duchati (mezzanine floor) by putting an iron gurder within the shop in dispute and in view of various judgments of the Hon'ble Apex Court followed by this Court, temporary construction of Duchati cannot amount to material alteration in the suit premises.

Learned counsel for the appellant also vehemently submitted that the plaintiff filed suit for eviction on the ground of personal bonafide necessity with a plea that the plaintiff's sons were studying in the medical college and after completion of their studies, they would start their medical clinic in the suit shop. During pendency of the suit, the plaintiff's sons completed their medical course and became doctors and thereafter, they joined the government services and that too not in Sri Ganganagar

where the shop in dispute is situated but in different States. Therefore, it is clear that the plaintiff's sons are well settled and they cannot do their private practice by running a clinic while in service. It is also submitted that after the decision of the trial court and appellate court, the appellant came to know that an open space of 10 feet x 22 feet has come into possession of the plaintiff and, therefore, the need of the plaintiff can be satisfied from the said open space. For this, the appellant has submitted an application under Order 6 Rule 17 CPC in second appeal before this Court. The appellant in the said application also sought permission to incorporate said plea of the defendant as well as wanted to include few facts relating to employment of plaintiff's sons. The plaintiff also placed on record the blue print of the said open space, which in the application after describing as open space has been shown as shop, which came into possession of the plaintiff after the death of plaintiff's father.

The plaintiff submitted reply to the application filed under Order 6 Rule 17 CPC and submitted that the plaintiff's father died on 24.10.1982 (before the decision of the trial court dated 22.8.1984) and said plot was inherited by the plaintiff as well as his two brothers Jagdish Rai and Atma Ram, therefore, the contention of the appellant that the need of the plaintiff can be satisfied from the said open space is absolutely wrong. It has not been denied that the plaintiffs' sons were in service.

The appellant's another application is that the first appellate court committed error of law by rejecting the

appellant's application for amendment of the written statement.

It appears from the application filed by the appellant before the first appellate court dated 8.8.1985 that the appellant sought permission to amend the written statement so as to include the fact that plaintiff's two sons Shanker Lal and Ghanshyam, after becoming doctors, joined the government service and, therefore, the ground for eviction has come to an end. It appears from the judgment of the trial court itself that the same ground was urged before the trial court by the appellant and that was considered by the trial court and the trial court held that it is not necessary that the person for whose need the suit has been filed should sit idle till he gets the possession of the rented premises.

The appellant submitted third application which is under Order 41 Rule 27 CPC seeking permission to produce document in support of the appellant's plea that the plaintiff's sons are in government service.

It will be appropriate to decide these applications first.

By the application under Order 6 Rule 17 CPC, the appellant sought permission to include facts about plaintiff's sons joining the government service during the pendency of the suit. The fact is not in dispute and it was in the knowledge of the appellant during the pendency of the suit itself and the ground was considered and rejected by the trial court.

For same purpose, the appellant submitted application for amendment of written statement before the first appellate court which was rejected by the first appellate court on the ground that the same plea was allowed by the trial court and has been rejected by the trial court in the impugned judgment.

In view of the above, it is clear that for the same plea, which was available to the appellant during the trial of the suit and he raised it and has been rejected by the trial court, has been sought to be raised again by moving application before this Court in second appeal despite the fact that even the first appellate court rejected the defendant's application taking the same plea in the written statement which has been considered by the trial court and has been rejected. Therefore, this is futile third attempt by the appellant in view of the fact that there was no necessity for seeking amendment when his plea has already been considered by the trial court as well as by the appellate court.

Another ground of the appellant is that the appellant came to know after decisions of two courts below that the plaintiff has come in possession of “open space” measuring 10 feet x 22 feet. The appellant has placed on record the blue print to show the location of said open space. It is strange that the appellant said that this fact came to know his knowledge from his adjoining neighbour, owner of Jindal Book Depot. The plea on the face of it is false because of the reason that looking to the fact that the appellant himself is tenant in the same building and the alleged open

space is behind his shop also within the building of the plaintiff, he cannot say that he came to know about this fact from his neighbour. Not only this, it has not been stated how this fact has not come to his knowledge despite having his business premises near the said open space. Otherwise also, the fact is absolutely irrelevant in the light of the reply given by the landlord respondent. Therefore, the application filed by the appellant under Order 6 Rule 17 CPC is dismissed.

The second application filed for raising additional ground against rejection of the appellant's application for amendment of the written statement also deserves to be dismissed only because of the reasons given above which covers the plea taken by the appellant in this application. Accordingly, this application is also dismissed.

The third application under Order 41 Rule 27 CPC is also liable to be rejected because of the simple reason that by this, the appellant wants to seek permission to produce evidence in fact which has already been admitted by the plaintiff and his sons by admitting that they cleared their medical course and joined service. Therefore, this application is also dismissed.

It appears from the findings recorded by the two courts below that the two courts below, after considering the evidence of the parties and even after considering the fact of joining the service by the plaintiff's sons, concurrently held that by joining service by the plaintiff's sons, it cannot be said that the need of the

plaintiff's sons has come to an end. Two courts below rightly held that it is not expected from the persons for whose need the suit for eviction of tenant has been filed, should remain idle till he gets possession of the suit shop. The view is now well settled and the relief cannot be denied to the landlord on the ground of joining services etc. by the persons for whose need the eviction is sought.

It will be worthwhile to mention here that a special provision has been made in the Rajasthan Premises (Control of Rent and Eviction) Act, 1950 that in case, the premises is not used by the landlord for the purpose for which the eviction decree is sought, then the tenant is entitled to take possession back from the landlord.

In view of the above, this finding of fact recorded by two courts below suffers from no error of fact or law, therefore, the decree of eviction for tenant can be upheld only on the ground of personal bonafide necessity of the plaintiff, his sons.

The allegations of material alteration are that the appellant has damaged the walls of shop and put an iron gurder and thereafter constructed a duchati (mezzanine floor). According to the plaintiff, by that, the defendant has caused serious damage to the property and he also opened two ventilators for getting the light in that mezzanine floor.

There may be some substance in the submission of learned counsel for the appellant that that may not amount

to material alteration but in view of the concurrent finding of fact of the two courts below and particularly, in view of the fact that no relief can be granted to the tenant because of proof of personal bonafide necessity of the plaintiff for the suit premises, this Court is not inclined to entertain the appeal only for the purpose of academic purpose to decide whether from the evidence on record, the material alteration in the suit is proved or not.

Accordingly, I do not find that any substantial question of law arises in this appeal, therefore, this appeal deserves to be dismissed.

At this stage, learned counsel for the appellant submitted that the appellant is tenant in the suit premises since long, therefore, some time may be granted to the appellant to wind up his business.

Though it is very old matter and even second appeal was preferred in the year 1988 and the appeal has been admitted without formulating the substantial question of law, still looking to the totality of the facts, this Court deems that the appellant be granted some time to vacate the suit premises.

Therefore, it is ordered that in case, the appellant furnishes a written undertaking before the trial court within a period of two months from today that he shall hand over the vacant possession to the landlord by or before 31.12.2006 and shall not part with the possession or sublet

the suit premises during this period and shall pay all the arrears of rent and decreetal amount, if due, within a period of two months from today before the trial court or directly to the landlord, the decree under challenge shall not be executed till 1.1.2007. The appellant shall also deposit the rent month by month by 15th day of each succeeding month of his tenancy in the trial court.

In case of non-compliance of the order or default in payment of rent mentioned above, the decree shall become executable forthwith.

With the aforesaid concession, this appeal is dismissed.

(PRAKASH TATIA), J.

S.Phophaliya